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BOOK REVIEW

THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE. Edited by David Kairys. New York, Pantheon Books 1982. Pp. ix + 321. Paperback. $9.95.

Reviewed by John Holly III*

A reader who is in the mood for light, uncontroversial material should not sit down with *The Politics of Law*,[1] a collection of thought-provoking essays on the American legal system. The genesis of the book is the Theoretical Studies Committee of the National Lawyer's Guild. The perspective is leftist, often Marxist; the tone often combative. The essential message is that capitalism has gutted the ideals of the American law by converting all aspects of human life into dollars and cents, and by exalting individualism over social justice.

One hopes that more than a few practitioners will read this book. In the context of legal practice, every attorney makes choices about goals and tactics. Such choices are grounded in the attorney's own values. These essays can provide needed perspective on commonly held values by challenging basic assumptions and by exposing some of the consequences of legal choices. For any attorney whose practice expresses his or her values, this book will provide a stimulating, rewarding experience.

The book also offers superb material for the classroom. One example is Duncan Kennedy's "Legal Education As A Training For Hierarchy,"[2] a denunciation of white, male predominance in law school. According to Kennedy, law students are shown that passivity and deference are virtues, and that emotional content in learning is not suited to the rational analysis of law. Professors and employers model this hierarchy

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1. THE POLITICS OF LAW (D. Kairys ed. 1982).

2. Kennedy, *Legal Education as Training for Hierarchy*, in THE POLITICS OF LAW, *supra* note 1, at 40.

of values for students who will, in later years, relate similarly as senior partners and judges.[3]

Kennedy points out that a major function of law school is to provide unskilled labor for the organized bar. Students are ranked into a hierarchy without regard to the goal of competent legal practice. Since they are not equipped for many varieties of law practice, students are expected to scramble to find places within a hierarchy of conventional law firms in order to obtain necessary training.[4] The value of exposing students to Kennedy's ideas is that he asks important questions about personal values. This inquiry could help stave off boredom and cynicism, and some law professors might actually enjoy teaching more if fewer students were bored and cynical.

The purpose of this book is to connect the legal system to the wider political-economic context of American life. The values of the legal system permeate every social institution. Such basic concepts as "person," "property," and "government" are defined through the law. Implicit in these definitions is the ideology of American life; the authors assume that the values of the dominant class adopt only enough change to placate subordinate classes. As editor Kairys notes, "[t]he law is a major vehicle for the maintenance of existing social and power relations by the consent or acquiescence of the lower and middle classes."[5]

The methods used by American law to legitimate the status quo have evolved over time, and are chronicled by Elizabeth Mensch in her essay, "History of Mainstream Legal Thought."[6] Beginning from the foundation of the natural law, Mensch observes that legal thinkers coined the concept of utility in order to accommodate the industrial revolution. Then, in the late nineteenth century, judges created an analysis "premised on private rights and strictly limited public powers,"[7] which helped to restrain populist and progressive reforms.

Mensch goes on to note that this objective analysis was attacked after World War I by those known as legal realists.

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3. *Id.* at 59.

4. *Id.* at 52.

5. Kairys, *Introduction*, in THE POLITICS OF LAW, *supra* note 1, at 5.

6. Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW, *supra* note 1, at 18.

7. *Id.* at 24.

The realists pointed out that every private right upheld by a court is a grant of public power. The emphasis, according to the realists, should be the social and historical context of the law. Contemporary judges are heirs to this tradition of accommodation followed by rigidity and formalism. The modern solution is to concentrate on the "process" by which rights and duties are defined. The goal is to make the process live up to the reasonable expectations of the parties.[8]

Mensch has written an extremely good but unsympathetic history. She sees the major function of American law as a bludgeon to be used by the powerful against the powerless.[9] Unfortunately, she does not resolve the tension between stability and the reality of change, so her criticism runs shallow. Seeming not to appreciate the human dimension of the law, perhaps Mensch fears that such appreciation would lead to an apology for what she can only see as exploitation and oppression.

In contrast to Mensch, Victor Rabinowitz in his essay, "The Radical Tradition In The Law,"[10] accepts that humans are far from perfect and that legal systems are human creations. Unlike Mensch, he explicitly states his basic assumptions, so the reader can always understand his perspective. A final contrast with Mensch is that Rabinowitz is an optimist. He sees the law as a positive force which can inspire a vision of social justice and can lead to an improvement in people's lives.[11]

One of Rabinowitz's basic assumptions is that "[n]o society of even moderate complexity, whether it be feudal, capitalist or socialist, can exist without law."[12] Further,"[a]ll systems of law are constructed to protect the state and its economic base."[13] Law, therefore, is necessary, and necessarily related to the economic system. But the law can develop independently of economics because people yearn for "a better, more rational, and more bearable existence. . . ."[14] This

8. *Id.* at 26-29.

9. *Id.* at 20.

10. Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW, *supra* note 1, at 310.

11. *Id.* at 317-18.

12. *Id.* at 312.

13. *Id.*

14. *Id.* at 317.

yearning pressures the state to limit its own power in the interest of stability. With the state limiting its powers, progress can be made toward legal equality and fairness.

Lawyers can be part of this progress according to Rabinowitz. But the law, and lawyers, cannot be the only answers. Achieving the goals of a socialist state has never been an object of American law. Such changes can only "be brought about by extra-legal means."[15] So Rabinowitz adopts a moderate approach to the role of the radical lawyer. He does not expect miracles, but he affirms that positive change has occurred. And, best of all, he proposes a course of action for lawyers:

> We can do our best to keep radical activists out of jail and on the streets. We can seek to extend to their ultimate limits the rights of free speech, due process, freedom from unreasonable searches . . . to make more possible changes in our economic system. We can expose police abuse and protect the right of privacy, both in political and personal affairs. . . . We can . . . join . . . in the struggle for the establishment of democracy in the trade unions.[16]

The fact that Rabinowitz, unlike Mensch, offers a plan of action can be attributed to his acceptance of human imperfection and his optimism toward future change. Rabinowitz appears to have found a way to be an idealist in touch with reality. As such, he provides an approach to the rest of the book.

"A realistic . . . approach to the law . . . must acknowledge the fundamental conflicts in society," such as class, race, and sex.[17] The relative impact of these conflicts can be seen in the better essays in the collection. These essays organize disparate facts into a coherent picture, offer plausible explanations of current events, and point the way toward progressive change.

For example, the legal system has attempted to resolve the antagonism between the sexes in varying ways throughout American history. One constant factor has been the oppression of women which "has changed historically in a dialectical relationship to changes in economic and social development

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15. *Id.* at 315.
16. *Id.* at 317-18.
17. Kairys, *supra* note 5, at 6.

and . . . the role of the family."[18]

The current state of the law, say Nadine Taub and Elizabeth Schneider,[19] relies on the fact that only women can become pregnant to justify differential legal treatment. Two Supreme Court cases, *Geduldig v. Aiello*[20] and *Michael M. v. Superior Court*,[21] are used to illustrate this point. In *Geduldig*, the Court upheld the exclusion of pregnancy from coverage by worker's temporary disability insurance. In *Michael M.*, the Court upheld the exclusion of women from punishment under statutory rape laws.

Taub and Schneider observe that workers are often denied full employment benefits. Because of pregnancy, it appears that young women can be held to a lesser standard of responsibility than young men. It is important to see that these two ideas reinforce one another. Denying women equal employment benefits appears to be justified because they do not have to bear equal burdens of responsibility.[22] Exploitation is justified in the law by the results of exploitation.

This same type of legal analysis is applied to race relations in two well-written essays by W. Hayward Burns[23] and Alan Freeman.[24] Both observe that, although *Brown v. Board of Education*[25] removed legal support for the white supremist doctrine of "separate but equal" from governmentally sanctioned classifications, an equally pernicious myth which promises "equality of opportunity" holds sway among our largely non-white underclass today. This new myth allows some modern Americans to be born into advantage without a corresponding personal sense of social obligation, while other citizens born into disadvantage internalize a personal sense of failure.[26] The Burger Court, says Freeman, allows a remedy

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18. *Polan, Toward a Theory of Law and Patriarchy*, in THE POLITICS OF LAW, *supra* note 1, at 296 (footnote omitted).

19. Taub & Schneider, *Perspectives on Women's Subordination*, in THE POLITICS OF LAW, *supra* note at 117.

20. 417 U.S. 484 (1974).

21. 450 U.S. 464 (1981).

22. *See also* Rostker v. Goldberg, 453 U.S. 57 (1981)(male only draft registration does not violate equal protection).

23. Burns, *Law and Race in America*, in THE POLITICS OF LAW, *supra* note 1, at 89.

24. Freeman, *Antidiscrimination Law: A Critical Review*, in THE POLITICS OF LAW, *supra* note 1, at 96.

25. 347 U.S. 483 (1954).

26. "Blacks posted gains in home ownership, education, and voter registration

for racism only when an intentional perpetration of racism can be identified. This approach allows all those not labeled as perpetrators to successfully avoid liability and to disassociate themselves from racial problems.[27]

Another major theme of *The Politics of Law* is that the law promotes capitalist values. Victor Rabinowitz's assumption that law protects the economic base of society is explored in essays which examine the interaction of capitalism with American law.[28] The core values of capitalism, according to economist Robert Heilbroner, incorporate a basically uncontrolled market system and rest on the private ownership of the means of production. These values protect the class which currently owns society's productive assets. "Certainly capitalism aims at the material well-being of its constituents, but equally certainly it entertains no thought that the pursuit of well-being will alter the basic class character of the system . . . ."[29] Several essays provide significant insight into the interaction between law and capitalism.

In "Critical Theory and Labor Relations Law"[30] the author, Karl Klare, says that the law has improved to the point of codifying procedural equality between the labor force and those who represent capital. But the law also supports substantive inequalities which reflect social inequities. Procedural equality, states Klare, is found in the reciprocal promises by which labor promises not to strike and capital agrees to submit to arbitration of grievances. The substantive inequality is that the union's promise not to strike is absolute, but capital owners can exempt certain issues from arbitration. By examining those issues which are kept from arbitration, Klare reveals the underlying values of labor law.

For instance, Klare postulates that capital owners regard the labor business exclusively as the sale of labor as a commodity, like rubber, steel, or cement. A complementary postu-

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in the 1970's, but black unemployment soared 140 percent and poverty continued [steady at 34 percent]." *Census Bureau, America's Black Population: 1970 to 1982*, San Jose News, Aug. 22, 1983, at 4A, col. 2.

27. Freeman, *supra* note 24, at 98-99.

28. Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW, *supra* note 1, at 312.

29. R. HEILBRONER, *Reflections on the Future of Socialism*, in BETWEEN CAPITALISM AND SOCIALISM, 79, 81 (1970).

30. Klare, *Critical Theory and Labor Relations Law*, in THE POLITICS OF LAW, *supra* note 1, at 65.

lation is that workers make no recognizable investment in a company. A second primary concern of the existing capital forces is that the unrestricted freedom of capital owners to invest must be protected and enhanced. A third concern of the existing capitalists identified by Klare is that the workplace must embody a social hierarchy, with capital at the top and labor at the bottom.[31]

These values ignore the fact that labor is provided by thinking, feeling, human beings. People build homes, schools, churches, and playgrounds to form a community near their workplaces. This is truly an investment of financial and emotional resources. The fact that a community could be destoyed by a plant shut-down or a pollution spill supports the conclusion that the interests of workers run more deeply than is presently recognized by our existing body of labor law. The fact that worker's taxes contribute to bail out a company like Chrysler and to buy a nationally owned space shuttle from Lockheed shows that workers, too, have a political stake in corporate decisions. Author Klare proposes to expand the scope of labor's involvement in the decision-making process to include new notions about the content and purpose of work and to revamp the allocation of social resources.[32] For Klare, labor law is one arena in which the evolution to greater human freedom should take place by reordering the existing hierarchy.

To continue the iconoclastic tenor of *The Politics of Law*, an extremely cogent analysis of capitalism, crime, and police conduct is presented by Mark Kelman in his essay "The Origins of Crime and Criminal Violence."[33] Kelman reviews and compares both the traditional mainstream and traditional radical views of the origins of crime. Traditional criminologists ignore the fact that poverty and exploitation are factors of crime in America. Radical criminology cannot account for the rising rates of amoral, nihilistic violence.[34] Finding both theories wanting, Kelman develops his own theory.

The central idea in Kelman's theory is that crime and criminals are outputs of society, similar to cars, soybeans, and

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31. *Id.* at 74.

32. *Id.* at 81.

33. Kelman, *The Origins of Crime and Criminal Violence*, in THE POLITICS OF LAW, *supra* note 1, at 214.

34. *Id.* at 220, 224.

engineers. Our economic and social systems produce and distribute crime by the same mechanisms with which they produce and distribute these other products. It seems that America has decided that it is more efficient to bear the costs of crime (in terms of victims, jails, judges, police, and the like) than it would be to create opportunities for unskilled, uneducated people.[35] America has come to this point, writes Kelman, as a result of value choices which measure all aspects of human life in dollars and cents.[36]

The materialistic aspect of American law is further severely criticized by Richard Abel in his essay, "Torts."[37] Tort law has evolved, argues Abel, because money has become equated with "labor, possessions, care, emotional and physical integrity, and ultimately love."[38] The ideal of individualism has become warped to the point that, as a tort plaintiff, a person is worth what he or she owns.[39] Awards for injury and death actually add value to the gross national product. Social class, gender, and race have become factors in deciding who will be most at risk from accidents, while personal injury suits have become lottery tickets with the winners envied by the losers and the lawyers skimming money "off the top." By means of those absurdities, says Abel, the law reinforces bourgeois ideology.[40]

Abel's proposal for a way out of this abyss is to democratize the risk of accidents, instead of merely spreading the costs. Those most at risk should have the greatest voice in matters of health and safety. Instead of gambling on compensation for pain and suffering, Abel would limit awards to recoveries for property damage and lost earnings. This, he says, would free up resources to promote equality of compensation, comprehensive medical care, and adequate income guarantees. His proposals would stimulate a more egalitarian society and remove human care and love from the commodities market.[41]

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35. *See* Rudovsky, *The Criminal Justice System and the Role of the Police*, in THE POLITICS OF LAW, *supra* note 242 (only Russia and South Africa imprison a higher percentage of their population than America).

36. Kelman, *supra* note 33, at 225-26.

37. Abel, *Torts*, in THE POLITICS OF LAW, *supra* note 1, at 185.

38. *Id.* at 187.

39. *Id.* at 190.

40. *Id.* at 194.

41. *Id.* at 198-99.

Attacking some of our core beliefs about the Constitution and the first amendment, Mark Tushnet, in "Corporations and Free Speech,"[42] observes that speech, like all aspects of human life in America, is a commodity which has found a place in the market.[43] When speech is regulated only by supply and demand it becomes merely "another one of the assets held by the powerful," instead of "a vehicle by which otherwise powerless people can gain power."[44] A classic example of wealth buying power through political speech is the case of *Buckley v. Valeo*,[45] in which the Supreme Court invalidated limits placed on political campaign contributions because "there [is] no overriding interest in 'restrict[ing] the speech of some . . . in order to enhance the relative voice of others . . . .' "[46] This case could be used to illustrate the aphorism that money talks and a lot of money talks loudly.

David Kairys, like Tushnet, thinks that effective communication is expensive.[47] But this fact is obscured by an aura of sacredness which cloaks the first amendment. Effective communication, writes Kairys, is never "free." It costs not only money, but lives as well.[48] Popular progressive movements have always paid a price for expressing opposition to the status quo. Much of his essay, "Freedom of Speech," chronicles the repression of dissent in America, from the Alien and Sedition Acts, through the abolition movement, to the bloody struggles of the Wobblies and the developing labor unions. Usually, says Kairys, broadening and strengthening the protections of the first amendment has *followed* basic shifts in power and social relations.[49]

Kairys points out that judicial opinion is deceptive because it ignores the political nature of the first amendment. Judges and scholars have viewed the first amendment as a facet of American jurisprudence instead of as a creature of social and economic forces.[50] Instead of a dramatic progress to-

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42. Tushnet, *Corporations and Free Speech*, in THE POLITICS OF LAW, *supra* note 1, at 253.
43. *Id.* at 256-57.
44. *Id.* at 257.
45. 424 U.S. 1 (1976).
46. Tushnet, *supra* note 42, at 259 (quoting *Buckley*, 424 U.S. 1, at 48-49).
47. Kairys, *Freedom of Speech*, in THE POLITICS OF LAW, *supra* note 1, at 140.
48. *Id.* at 166.
49. *Id.* at 141.
50. *Id.* at 161.

ward liberty and equality, the legal system has created the image of polite discourse among refined people. Instead of being regarded as a lever, a tool for changing society, free speech has become a museum piece, to be admired but not utilized.

Kairys continues his exposé of judicial deception in his essay on "Legal Reasoning."[51] When judges claim to apply a "neutral, objective application of legal expertise" instead of acknowledging the personal, social, and political values which are at work, judges commit the "central deception of traditional jurisprudence."[52] The judiciary stands on precedent, knowing full well that the "various relevant precedents will provide some support for both sides rather than lead to a particular rule."[53] Courts have only abandoned stare decisis when "the legitimacy and power of the courts stood to be enhanced by openly rejecting continuity in favor of politically popular change."[54] Although he does not state so explicitly, Kairys seems to think that the harm is not in the political nature of the judiciary, but in the facade of objectivity used to hide this political nature.

To conclude, the foregoing highlights some of the most worthwhile material in this unusual collection. Rand Rosenblatt's common-sense socialistic explanation of the holding in *Dandridge v. Williams*,[55] Peter Gabel and Jay Feinman's idea that modern contract law embodies an ironic contradiction in American ideals,[56] and Robert Gordon's thought that "[l]aw, like religion and television images, is one of these clusters of belief . . . that convince people that all the many hierarchical relations in which they live and work are natural and necessary,"[57] all make for provocative reading, too.

Obviously, this controversial collection of essays is ambitious in scope. Tracing the history of American law provides a

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51. Kairys, *Legal Reasoning*, in THE POLITICS OF LAW, *supra* note 1, at 11.

52. *Id.* at 13.

53. *Id.* at 14.

54. *Id.* at 16.

55. 397 U.S. 471 (1970) *cited in* Rosenblatt, *Legal Entitlement and Welfare Benefits*, in THE POLITICS OF LAW, *supra* note 1, at 270 (the limiting of monthly grants to welfare families results in denying benefits to children rather than in encouraging adults in the work force).

56. Gabel and Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW, *supra* note 1, at 179-80 (the American ideal of free trade and Horatio Alger does not apply to the modern law of contracts, where stability and predictability are essential).

57. Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW, *supra* note 1, at 287.

needed perspective for current problems. But too few of the authors state in print what can be glimpsed between their lines: they believe in the perfectability of society and they are committed to a more just, humane world. Perhaps they take these beliefs for granted in themselves, but more explicit statements of this type might have provided a more coherent overview to the work as a whole.

At its best, as in the essays by Victor Rabinowitz, Karl Klare, Nadine Taub and Elizabeth Schneider, *The Politics of Law* illuminates the pivotal role of the American legal system. At its best, the book is sensitive to the evolution of our system toward the ideal of "due process of law." If you believe that the present historical period involves significant change from the past and involves a search for greater legitimacy for social institutions, then *The Politics of Law* may stimulate your thinking to better prepare you for the future.